

FCC MAIL ROOM

SEP 9 9 10 AM '99

Before the
FEDERAL COMMUNICATIONS COMMISSION
 Washington, D.C. 20554

FCC 99M-49

90596

In re Applications of)	MM DOCKET NO. 99-153
)	
READING BROADCASTING, INC.)	File No. BRCT-940407KF
)	
For Renewal of License of)	
Station WTVB(TV), Channel 51)	
Reading, Pennsylvania)	
)	
and)	
)	
ADAMS COMMUNICATIONS CORPORATION)	File No. BPCT-940630KG
)	
For Construction Permit for a New)	
Television Station to Operate on)	
Channel 51, Reading, Pennsylvania)	

MEMORANDUM OPINION AND ORDER

Issued: September 2, 1999

Released: September 3, 1999

Background

1. This is a ruling on a Motion To Enlarge Issues that was filed by Adams Communications Corporation ("Adams") on July 15, 1999. An Opposition was filed by Reading Broadcasting, Inc. ("Reading") on August 11, 1999.¹ The Mass Media Bureau ("Bureau") filed Comments on August 11, 1999. Adams filed a Reply on August 23, 1999. Reading filed a Reply To Mass Media Bureau's Comments on August 23, 1999.

2. Adams seeks to add two issues against Reading: (1) an issue to determine whether Reading is disqualified in light of adjudicated misconduct of Micheal Parker ("Parker"), Reading's president, a director and substantial shareholder and; (2) an issue to determine whether Parker engaged in a pattern of misrepresentation and/or lack of candor in failing to fully advise the Commission of the actual nature and scope of such previously adjudicated misconduct.

¹ A short extension to file on August 11, 1999 was granted for cause. See Order FCC 99M-43, released July 27, 1999.

Facts

Micheal L. Parker

3. Mr. Parker is key to the issues sought by Adams. In its Diversification Statement, Reading discloses that Parker owns 39% of Reading's voting stock and votes an additional 8.9% through an irrevocable proxy. Parker also is president, chief executive officer and one of Reading's five directors.

4. Parker owns and controls Two If By Sea Broadcasting Corporation ("TIBS"), a Delaware corporation that holds Parker-controlled broadcast interests. Reading's Diversification Statement further discloses:

TIBS is licensee of International Broadcast Station KAIJ, Dallas, Texas, and is the proposed assignee of the licenses and assets of commercial television station WHCT, Hartford, Connecticut, from Martin W. Hoffman, Esq., trustee in Bankruptcy [file omitted]. On April 9, 1993, TIBS was granted a construction permit for a new FM translator station to operate on Channel 221, Upland California [file omitted]. As of August 16, 1999, TIBS is operating WHCT for the Trustee in Bankruptcy pursuant to a local marketing agreement which expires on or about June 1, 2000. TIBS has been operating WHCT pursuant to such an agreement since February 8, 1997.

Parker also owns and controls Desert 31 Television, Inc. which holds the permit for a commercial television station in Twentynine Palms, California.

Issue I

Adjudicated Misconduct

The following issue concerns past adjudications of Parker:

To determine whether, in view of the previously adjudicated misconduct of Micheal L. Parker, the controlling shareholder and dominant principal of Reading Broadcasting, Inc. is qualified to remain a licensee.

Mt. Baker Broadcasting

5. In 1988, Parker was determined to be responsible for failing to timely construct and activate a broadcast station and in ultimately constructing a facility which varied substantially from the proposed engineering that had been approved. As a result, the Commission approved the Bureau's cancellation of the permit. See Mt. Baker Broadcasting Co., Inc., 3 F.C.C. Rcd 4777, 4778 (1988)

(because of aggravating circumstances of Parker's deception the Commission cancelled the construction permit and rejected forfeiture as an adequate alternate sanction). The legal significance of the proceeding was to deny a request for an extension on an application for a construction permit. Id. at Paras. 2, 10. Adams does not cite to any other rulings or decisions of the Commission or the Bureau which comment on Parker's conduct in Mt. Baker, which was not a formally litigated case.

Religious Broadcasting Network

6. Also in 1988, after a formal adjudication, Parker was determined by the Review Board to have been responsible as an undisclosed real party in interest for a loss of integration credit of one of the applicants. See Religious Broadcasting Network, et al., 3 F.C.C. Rcd 4085, 4090-91 (Review Bd. 1988). The Review Board concluded that in the process of not disclosing his interest in the applicant, Parker had perpetrated "a travesty and a hoax" and an "attempted fraud" on the Commission.² Id. However, the disposition of the case only was to deny the application (along with several others in an omnibus ruling) rather than dismiss the application because of disqualification. The case was ultimately settled and the Parker sponsored party received a significant payoff in return for a voluntary dismissal of the unqualified application. Religious Broadcasting Network, 5 F.C.C. Rcd 6362 (1990).

Assignment of Hartford License

7. In 1997, the Commission considered the adverse findings in Religious Broadcasting Network to be significant in denying Parker an assignment of the license for Station WHCT-TV, Hartford, Connecticut. See By Direction Letter dated January 30, 1997, Two If By Sea, et al., 12 F.C.C. Rcd 2254, 2257 (1997) (serious questions remain regarding assignee Parker, the trustee Hoffman who was alleged to hold only a bare license and Astroline Communications Co. ("Astroline"), the trustee's assignor which was accused of having misrepresented itself as a minority-controlled entity). The Commission noted as to Parker/TIBS:

Serious character questions also remain regarding the assignee, Parker/TIBS. For example, in one instance an administrative law judge disqualified an applicant in a comparative hearing for a new television station after finding Parker to be an undisclosed principal in that applicant. See Religious Broadcasting Network, 2 F.C.C. Rcd 6561, 6566-67 (I.D. 1987). The Review Board upheld the disqualification, characterizing the application as a "travesty

² The Review Board observed in an unrelated case that while it was not clear that a person named "Parker" was the same Micheal Parker (it was), the "modus operandi" was similar to Religious Broadcasting, supra. See Doylan Forney, 3 F.C.C. Rcd 6330, 6338, n.1 (Rev. Bd. 1988). The Review Board repeated language of "travesty" and "hoax." Id. But since Parker was not a party to the case and the Review Board was not making a relevant finding or reaching a related conclusion, those references to Parker in a Doylan Forney footnote are given no weight in this ruling.

and a hoax." 3 F.C.C. Rcd 4085, 4090 (Review Bd. 1998), and the applicant as a "transcious sham" which had "attempted fraud" upon the Commission. Id. at 4091.

Commission Letter, supra, 12 F.C.C. Rcd at 2257. But, on analysis, it appears that the assignment was denied because of the "numerous allegations against the parties involved in this assignment." Id. Therefore, there were issues in addition to but unrelated to Parker that resulted in the denial of the Hartford assignment.

8. On April 28, 1997, the Commission designated for hearing the renewal application of the trustee-in-bankruptcy who was attempting to assign the license of Station WHC-TV, Hartford Connecticut, to TIBS. In re Applications of Martin W. Hoffman Trustee-in-Bankruptcy for Astroline Communications Co., Limited Partnership, 12 F.C.C. Rcd 5224 (1997). Issues were set to determine whether Astroline had misrepresented facts to the Commission concerning its status as a minority-controlled entity. The designation order noted that Schurberg Broadcasting of Hartford ("Schurberg"), the party objecting to the Astroline license renewal, had alleged that TIBS also lacked the basic qualifications to hold a license. The Commission concluded in the Astroline HDO that in light of its action in setting the renewal hearing, "we need not address these allegations [against TIBS]." Id. Thereafter, there was no proceeding brought in which the Commission (or the Bureau By Direction) set an issue with respect to Parker's basic qualifications.

Assignment of Norwell License

9. The question of Parker's adjudicated conduct arose again one month later. By letter dated May 22, 1997, the Bureau consented to an assignment by Parker of the license for Station WHRC(TV) Norwell, Massachusetts. In that letter, the Bureau described the renewal hearing of Station WHCT-TV, Hartford, Connecticut. The Bureau also cited the By Direction Letter, supra, wherein "the Commission determined that there were substantial questions of material fact with respect to Parker's qualifications to be the licensee of the Hartford facility." But there was no hearing designated to determine Parker's basic qualifications because "the misconduct alleged in the Hartford proceeding does not appear to have involved the day-to-day operation of the Norwell station" and "neither the HDO nor the Commission's By Direction Letter limited the transferability of any stations commonly held by Parker." The Bureau concluded that "we do not find the outstanding matter relating to Mr. Parker is an impediment to a grant of the subject license assignment application." Id.

Issue II

Misrepresentation/Lack of Candor

The following issue alleges deceptive disclosures:

To determine whether Micheal L. Parker engaged in a pattern of misrepresentation and/or lack of candor in failing to advise the Commission of the actual nature and scope of his previously adjudicated misconduct and, if so, the effect of such misrepresentation and/or lack of candor on RBI's [Reading's] qualifications to remain a licensee.

10. After the adverse findings in Religious Broadcasting Network and Mt. Baker, Parker was party to several unrelated applications for assignments. Adams alleges that there were intentional failures by Parker to fully disclose in the assignment applications the import of the aforementioned adverse cases and that those failures to fully disclose were an attempt to convince the Commission staff that Parker's qualification problems were insignificant. But while those same adverse adjudications were known to the Commission staff, Parker was found to be qualified to acquire stations in Reading, Pennsylvania (assigned in bankruptcy reorganization); Twentynine Palms, California; and Dallas, Texas. Therefore, when the adverse findings and conclusions were brought to the Commission's attention by Parker concerning the proposed assignment of Hartford Station WHCT-TV in late 1996 and early 1997, Parker argued that there should be no concern since the Commission earlier had found Parker qualified to participate in assignments. In each assignment, Parker utilized substantially the same exhibit to disclose his version to the Commission. That exhibit reported that there had been a denial of an application for an extension of time in the Mt. Baker case. The exhibit also reported that a person that Parker was consulting in the Religious Broadcasting Network case was not the real party in interest and that for the comparative analysis, Parker was deemed to be the real party. There was no disclosure of the fact that in Mt. Baker there had been a cancellation of a permit for failure to construct and that because of aggravating factors involving deception, a forfeiture in lieu of cancellation would not be accepted by the Commission. Nor was there a disclosure of the adverse findings of the Review Board in Religious Broadcasting Network that Parker had engaged in a "hoax" or "attempted fraud" on the Commission.

Discussion

11. This hearing was initiated by Hearing Designation Order DA 99-865, published in the Federal Register on June 15, 1999. See 64 FR 32046. The Commission's rule for adding post designation issues requires that in comparative renewal cases the request be filed within 30 days of the designation order's Federal Register publication. 47 C.F.R. §1.229(b). Adams Motion To Enlarge Issues was timely filed. The motion also must contain specific allegations of fact sufficient to support the adding of the issues.³ Adams' motion has not met this standard as to both issues.

³ The Rule requires that facts be established by affidavit based on personal knowledge. 47 C.F.R. §1.229(d). Adams did not submit affidavits. Since the issues depend on Commission documents on which Adams' arguments are based, there is no need for affidavits. The absence of any need for affidavits indicates that there is no direct evidence known to Adams of an intent to deceive. Therefore, such intent would need to be inferred solely from the lack of detail in the filed documents.

First Issue

12. The first requested issue would involve an adjudication of the basic qualifying effect of findings and conclusions against Parker in two prior proceedings, one of which (Religious Broadcasting) was heard before an Administrative Law Judge and further adjudicated by the Review Board, and the second (Mt. Baker) holding no hearing but concluding by Commission approval of a Bureau action denying an extension of time and cancelling a permit. Both proceedings were concluded in 1988. As a general rule, the Commission applies a time limitation on adding character issues based on ten-year old information that is within the Commission's control and that should have been discovered, even where the alleged misconduct indicates a "flagrant disregard of the Commission's regulations and policies." See Character Qualifications, 102 F.C.C. 2d 1179, 1229 (1986). The Commission is concerned about the "inherent inequity" and "practical difficulties" involved in responding to old facts. See Kay-Smith Enterprises, 71 F.C.C. 2d 1402, 1406-1407 (1979) (to require response to allegations of events occurring years ago, movant must provide both factual support and some rationale to support conclusion that old violation currently raises a substantial and material question of fact bearing on license renewal).

13. As evidenced by the Bureau's letter dated May 22, 1997, authorizing the Parker assignment of the Norwell license, the adverse findings in Religious Broadcasting Network and Mt. Baker which do indicate a disregard of Commission regulations and policies in connection with those cases, were known to the Bureau before the Bureau's issuance of the designation order in this case. There has been no suggestion in the Bureau's Comment pleading of any unawareness of the questions of record of Parker's past conduct that have been addressed by the Commission in the Hartford and the Norwell assignments. The fact of such predesignation knowledge at the Bureau's highest levels is established by the commentary in the By Direction Letter, supra which refers to "serious character questions" concerning Parker that could not be resolved without a hearing. But there was no statement or inference in either the By Direction Letter or the Norwell Letter that there would be or should be a hearing on those serious questions at the next available opportunity. The next opportunity to address those serious "character questions" occurred in designating Reading's license renewal for hearing in this proceeding. But the issues were never set in the Reading HDO.

14. In light of the Bureau acknowledgements in 1997 of the serious findings that had been made against Parker, the absence of any discussion in the Reading designation order would suggest that the Bureau specifically decided not to set the issues for formal adjudication. In fact, the Reading HDO concludes in part that "[both of] the applicants appear qualified to construct and/or operate as proposed." There was no suggestion in the designation order that the Presiding Judge should or might consider adding issues relating to those "serious questions." Cf. Atlantic Broadcasting, 5 F.C.C. 2d 717 (1965); Ft. Collins Telecasters, 103 F.C.C. 2d 978 (Review Bd. 1986); Frank H. Yemm, 39 Radio Reg. 2d 1657 (1977) (there is no authority for a presiding judge to add issues on matters that have been considered by the Commission or a delegated Bureau). Because of the lack of any specific discussion in the designation order, the Presiding Judge believes that he is not precluded from adding the issue. Id. However, the absence of the issue in the HDO is taken seriously. The Norwell letter reasonably leads to a conclusion that the Bureau made a decision not to set the Religious Broadcasting or Mt. Baker adverse conclusions for formal adjudication. That decision would be consistent with the Commission policy against setting issues that do not effect the operation of the station in issue. Cf.

Straus Communications, Inc., 64 Radio Reg. 2d 556-557 (1987) (assignments of station licenses will be made even where character qualifications of common owner are being adjudicated in other unrelated proceeding). See also Character Qualifications, 102 F.C.C. 2d at 1223-24 (conduct at one station not necessarily predictive of other station operations unless conduct is fundamental to a licensee's holding a station license). Therefore, it is concluded that the adjudicated conduct of Parker was not considered by the Commission or the Bureau to have been sufficiently egregious to warrant holding up license assignments in order to formally adjudicate the questions within the ten year limitation. Similarly, the matters were not considered by the Bureau to be sufficiently egregious to set the qualifying issue in the Reading HDO or, alternatively, the Bureau considered the issue to be now blocked by the ten year limitation.

15. In a related concern, Reading represents through verified statements that the Commission's files of the Mt. Baker and Religious Broadcasting proceedings have either been destroyed or archived which would present obstacles to further adjudication. While no doubt counsel would be diligent in recreating files, it can reasonably be anticipated that there would be issues to be litigated of authenticity and evidentiary completeness that would cause additional delay and haunt the case through the appeal process.⁴ It is concluded that there has not been a sufficient showing to warrant an exception to the Commission's ten year limitation, particularly in light of the apparent incompleteness of Commission file records of the adverse Parker adjudications. The Presiding Judge has discretion to control the scope of the litigation. Marlin Broadcasting of Central Florida, Inc., 2 F.C.C. Rcd 2025 (Review Bd. 1987) (wide latitude of presiding judges recognized to deal with exigencies of hearings). Here, due to the passage of time, sound and serious reasons have been presented by the Bureau and Reading for not adding the first issue.

Second Issue

16. The second issue involves disclosures in various assignment applications in which Parker was a principal and where disclosures concerning the two cases, Religious Broadcasting Network and Mt. Baker, were material and relevant to obtaining Commission approval for the transactions. There are no allegations and no showing is made that Parker failed to disclose that in fact he was involved in those proceedings or that he lost on the ultimate issues that were adjudicated or determined. Adams contends that the disclosures of fact were deliberately narrow and vague and therefore materially misleading. Adams also contends that in furtherance of keeping relevant information from being reviewed, the decisions were cited to the Commission staff using only the Commission's reference numbering system instead of citing the published decisions in the FCC Record or the FCC Reports.

⁴ The use of official notice would be questionable, particularly in the litigation of the first issue because of the reported incompleteness of related official files. See Reading Opposition at Exh. F. Official notice can be used to dispense with conventional proof only when the document is in the agency's file. See Newton Television, Ltd., 4 F.C.C. Rcd 2561 (1989).

17. While an applicant must be "fully forthcoming as to all facts and information relevant," the Commission will not find a party to be disqualified by omissions due solely to negligence or oversight. Swan Creek Communications, Inc. v. F.C.C., 670 F.2d 1217, 1222 (D.C. Cir. 1994). Rather, substantial evidence of an intent to deceive is the sine qua non of a misrepresentation or lack of candor finding. Id. An issue may be added on intentional misrepresentation or lack of candor only where the "totality of the evidence arouses a sufficient doubt on the point that further inquiry is called for." Citizens for Jazz on WRVR, Inc. v. F.C.C., 775 F.2d 392, 395 (D.C. Cir. 1985). The second issue is sought based on allegations that Parker did not go far enough in describing the contents of adjudicatory documents that were known to the Bureau staff to exist at a time when Parker was seeking a license or a transfer of a license to another party. In considering the disclosures that are cited by Adams in supporting exhibits as alleged misrepresentations or disclosures lacking in candor, it does not appear that the standards are met for adding the second issue.

18. In all instances of alleged misrepresentation or lack of candor cited by Adams, there were references to Commission documents which were not falsified or denied by Parker. Rather, the documents were described by him with an apparent incompleteness which Adams argues amounted to misrepresentation or lack of candor. No party is contesting the fact that the documents were sufficiently identified to have been timely located and considered by the Bureau before any licenses were transferred. Thus, in a significant document submitted as Adams' Attachment B, Reading is shown to have submitted a narrative description of Parker's Commission actions in connection with Reading's bankruptcy reorganization.⁵ Reading truthfully disclosed that Parker had been denied an application to modify a construction permit for Station KPRR-TV in Hawaii; that an application for a new TV station at Sacramento, California was dismissed with prejudice at the request of Parker; that there had been a denial of a request for an extension of time in Mt. Baker; and that the application that Parker had sponsored in Religious Broadcasting Network was denied because Parker was declared the real party in interest. None of those representations are shown to be affirmatively false.⁶

⁵ See Memorandum Opinion and Order, FCC 99M-47, released August 9, 1999.

⁶ Adams submitted in its Attachment C an application as assignee for consent to assignment for Station KCBI, Dallas, Texas which enumerated in abbreviated descriptive language the status of seven consent assignment requests: Commission granted involuntary assignment of Station WHRC(TV), Norwell, MA to court appointed receiver; Parker has application pending for transfer of control of Station KVMD(TV) at Twentynine Palms; TIBS has pending application for translator or FM booster station on Channel 201 at Upland, CA; Parker has application for consent to assign license of Station KZIA(TV), Las Cruces, New Mexico; Parker has application pending for new low power TV Station at Los Angeles, CA; Parker has an application pending for new low power TV Station in San Francisco, CA; Parker has an application pending for construction permit modification of Station KPRR-TV, Honolulu, Hawaii, which application was dismissed with prejudice at the request of Parker; Parker has application pending for new commercial TV Station in Sacramento, CA which was dismissed with prejudice at Parker's request. In addition to those actions, Reading made what became standard disclosure about Mt. Baker (denied extension) and Religious Broadcasting Network (Parker held to be real party in interest and case settled with Parker receiving no interest in the station). The same or similar disclosures were shown in Adams Attachments D and E. In all instances of these filings, there were only references to Commission file numbers. There were no citations provided for locating the documents in FCC Record, FCC Reports, or even in the unofficial Pike & Fisher Radio Regulation.

Effect Of Settlement

19. Ultimately, the Religious Broadcasting case was terminated by a settlement that was accepted by the Review Board in which Parker and his group received a payoff in the amount of \$850,000 in exchange for Parker voluntarily dismissing the application. Religious Broadcasting Network, et al., 5 F.C.C. Rcd 6362, 6363 (Review Bd. 1990). The effect of that settlement was to render moot all of the adverse conclusions reached by the Review Board and by the Administrative Law Judge with respect to Parker and the dismissed applicant. However, the litigated findings of the Administrative Law Judge in the I.D. would be retained for possible use in another proceeding involving Parker. A.S.D. Answer Service, et al., 1 F.C.C. Rcd 763 (1986), recon. denied, 3 F.C.C. Rcd 4213 (1988). See also Velo Broadcasting, et al., Order FCC 88I-132, August 31, 1988 at n. 2 (by approving a settlement agreement the question of basic qualifications of one of the settling parties need not be resolved and adverse conclusions regarding qualifications may be vacated while underlying findings are preserved which may be relevant to future proceeding). The adverse conclusions in Religious Broadcasting Network became moot after the settlement. And after the passage of ten years, under the Commission policy set in Character Qualifications, supra, the preserved findings in Religious Broadcasting Network are no longer deemed relevant or reliable for determining the basic qualifications of Parker in this proceeding.

Failure To Give Citations

20. The Commission rules require that Commission documents must be cited in accordance with the FCC Record or the FCC Reports, depending on the age of the document. See 47 C.F.R. §1.14. Adams contends that it was an act of deception for Reading to have cited only to Commission file numbers and not to cite readily accessible sources such as the FCC Record or FCC Reports, depending on the date of the document. Adams argues that without the prescribed official FCC citations it is considerably more difficult to locate a particular decision with the result that the Commission staff was so discouraged from tracking down the decisional documents that were referred to in Parker's filings that there was no realization of the serious adverse conclusions against Parker. While recognizing that the task to locate decisions without being provided official citations would be slightly more difficult, it is speculative to conclude that the reviewing staff would be discouraged from researching and finding the documents that were material to the important matters under consideration.⁷ It is equally reasonable to infer in light of the detail given to the Hartford and Norwell letters, supra, that the Bureau staff were aware of the serious adverse findings. Only "concealment of information, evasion of FCC requirements or other deliberate failures to produce information can result in disqualification for lack of candor." Garden State Broadcasting v. F.C.C., 996 F. 2d 386, 393 (D.C. Cir. 1993) (emphasis in original), citing with approval RKO Gen. Inc., 4 F.C.C. Rcd 4072, 4073 (1989). And the

⁷ If it was considered too great an imposition, the filings could have been returned to Parker's counsel with instructions to follow Rule 1.14.

Commission will not permit issues to be added which are based on speculation. See Folkways Broadcasting Co., Inc., 33 F.C.C. 2d 806, 811 (Review Bd. 1972); and West Central Ohio Broadcasters, Inc., 1 F.C.C. 2d 1178 (Review Bd. 1965).

Conclusion

21. The Commission will not make adverse findings on misrepresentation or candor simply because there is a failure to provide sufficient information. There must be an accompanying intent to deceive. Fox River Broadcasting, Inc., 93 F.C.C. 2d 127 (1983). See also Garret, Andrews & Letizia, Inc., 86 F.C.C. 2d 1172 (Review Bd. 1981) (no exception or improper motive inferred from series of errors, omissions and inconsistencies). Ultimate negative events were disclosed in the assignment applications and, as revealed in the 1997 Norwell assignment letter, the Bureau was aware of prior misconduct. The Bureau also was in a position to get further information from the agency's files and/or from the parties to any of the assignment transactions. The disclosures of Parker having been found to be an undisclosed real party-in-interest would alone be sufficient to raise a serious question about his basic qualifications. The Bureau contends that a lack of candor may occur through a concealment, evasion or "some other failure to be fully informative" provided there is an accompanying intent to deceive. Joseph Bahr, 10 F.C.C. Rcd 32, 33 (Review Bd. 1994). An argument was made in Bahr similar to the one here that an applicant was not "fully forthcoming" about interests held by family members. The Review Board found the argument to be speculative. There must be something more found in the record other than a speculation that there might have been some deception. Id. In this case, in view of Parker's basically accurate disclosures and the Bureau's actual knowledge in 1997 of prior adverse conclusions on Parker's character, there was no reasonable ability for Parker or Reading to deceive the Bureau.

Order

22. Accordingly, for the reasons stated above, IT IS ORDERED that the Motion To Enlarge Issues filed by Adams Broadcasting Corporation on July 15, 1999, IS DENIED.

FEDERAL COMMUNICATIONS COMMISSION

A handwritten signature in dark ink, appearing to read "Richard L. Sippel", is written over a horizontal line.

Richard L. Sippel
Administrative Law Judge